RESPONDENT'S BRIEF ADVOCATING THAT CERTIORARI BE DENIED.

The Opinions Below.

Petitioner relies heavily upon the District Court, and asserts that the Circuit Court of Appeals did not understand the issues. In this connection, the opinion of the District Court is illuminating. It appears at page 404 of the record,—which citation was omitted by petitioner.

Statement of the Case.

The findings of fact, conclusions of law, and judgment of the District Court, which petitioner sets forth at length, were prepared by it for the signature of the District Court. They are no substitute for the record evidence; in fact, they are clearly contrary thereto. The case before this Court is concisely stated herein, at pages 2 and 3, *ante*.

Argument.

While the copyrightability of instrument charts has never been considered by this Court, we submit that the issue is controlled by the rule enunciated in *Baker* v. *Selden*, 101 U. S. 99 (1879). Selden's ledger sheets presented an original arrangement of material, but this Court held that they were not copyrightable because they were intended to be used as physical objects to be written upon. Petitioner's charts are used as physical objects, namely thermometer dials; and are written upon by the recording mechanism which cooperates therewith.

The enactment of the Copyright Act of 1909 (17 U. S. C., Secs. 1-63) did not overrule the law of *Baker* v. *Selden*. Petitioner contends that cases decided before 1909 are not to be relied upon in considering cases arising under the present act; but it relies upon *Bleistein* v. *Donaldson Lithographing Company*, 188 U. S. 239 (1903), which case arose under the Copyright Act of 1874. That case upheld copyright in circus posters which conveyed information, and which had no function other than as media through which the author spoke to the reader. The *Bleistein* case did not overrule *Baker* v. *Selden*.

The charts in suit are not instruments of communication. Therefore they are not "writings" and their corporate proprietors are not "authors" within the meaning of the copyright clause of the Constitution (Art. 1, Sec. 8, Clause 8) and Section 4 of the Copyright Act (17 U. S. C., sec. 4). The charts in suit are thermometer dials (R. 429); they are not drawings, and therefore do not belong in class 5(i) of the statutory list of copyrightable writings. They are mechanical devices, and the public interest requires that they exhibit the inventive level of patentability before they become monopolizable. In this, plaintiff's charts fail hopelessly. The court below was right in holding that "plaintiff's charts are not the proper subject of copyright" (R. 432).

Morevor, public policy forbids using the copyright law to force owners of machinery to purchase replacement supplies therefor exclusively from the vendor of said machinery.

Davis v. *Comitti*, 52 Law Times Rep. (N. S.) 539, 540 (1885).

Cf., *Morton Salt Co.* v. *The G. S. Suppiger Co.*, 314 U. S. 488 (1942).

International Business Machines Corporation v. *U. S.*, 298 U. S. 131 (1936).

The situation in the recording industry is aggravated by an understanding not to compete in the sale of charts, which is presently in force between the principal instrument manufacturers (R. 103, 351, 354, 359, 362, 365, 368, 371, 375). Petitioner and its "competitors" piously call this "respect [for] the copyrights of our competitors" (R. 375; Petitioner's Brief, p. 14). Such "respect" ignores the doctrine of equitable license, which holds that the purchase of a machine emancipates it from all monopolies upon the machine or any part thereof. The owner of a chattel can no more be restrained from using his property by a copyright than by a patent.

Cf. *Heyer* v. *Duplicator Mfg. Co.*, 263 U. S. 100 (1923).

Petitioner's brief makes no attempt to support its request for review of the trade-mark question, and we submit that such review should be denied regardless of this Court's action on the copyright issue.

Since petitioner does not raise the question of unfair competition, its accusation on that score is gratuitous. The court below pointed out the shabby character of the "evidence" used by petitioner to manufacture a sham case against respondent (R. 435-7).

We submit that the record in this case does not deserve review by this Court, but rather warrants review by the antitrust division of the Department of Justice.

Respectfully submitted,

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